No. 89-1560

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RICHARD MORRISON,
Petitioner

V.

STATE OF MAINE,
Respondent

REPLY BRIEF AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

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THE RECORD DOES NOT SUPPORT THE ASSERTION THAT THE PETITIONER RECEIVED EXTENSIVE WARNINGS CONCERNING THE DANGERS AND DISADVANTAGES OF SELF-REPRESENTATION.

The arguments set forth in the Respondent's Brief in Opposition are premised upon two fundamental misunderstandings concerning this case. First, in reliance upon findings made by the Maine Superior Court and affirmed on appeal by the Maine Supreme Judicial Court, the Respondent argues that the Petitioner received extensive warnings from non-judicial sources concerning the dangers and disadvantages of self-representation in his criminal case. Secondly, because of the supposedly extensive warnings given to the Petitioner, the Respondent claims that the Petitioner's argument reduces to "whether prophylactic Miranda-type pre-trial warnings by the trial court are constitutionally

mandated in all cases." (Brief in Opposition at 33).

As to the latter premise, the Petitioner does not argue that the trial court must give a rote warning to each pro se defendant as a constitutional prerequisite to a finding of that defendant's knowing and intelligent waiver of the right to counsel. The Petitioner acknowledges that a trial court may vary the extent of its warnings to a pro se defendant according to that defendant's apparent degree of knowledge, intelligence and competence (Petition at 42-43). But the difference between the communication by a trial court of some warnings to a pro se defendant and the failure of a trial court to provide any such warnings is a qualitative difference. Generally, in the absence of a colloquy which includes discussion of at least some of the risks associated with self-representation, it

is impossible for the trial court make an informed evaluation as to whether the defendant's "choice is made with eyes open." Faretta v. California, 422 U.S. 806, 835 (1975), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942).

In this case, the Respondent seeks to excuse the failure of the Maine Superior Court to inform the Petitioner of any of the severe risks of self-representation by arguing that the Petitioner received "extensive warnings" from others. Even if one were to accept the dubious theory that the trial court can delegate its informative function, or that warnings given by friends and family would have the same impact upon a pro se defendant as warnings delivered by a court, the record in this proceeding does not support the view that the Petitioner received from any source extensive warnings concerning the dangers and

disadvantages of self-representation. Characterizations to the contrary made by state courts, although phrased as findings of fact, are not binding upon this Court when such characterizations are "essential to the decision of a federal question." Keller v. State Bar of California, 496 U.S.___, 110 S. Ct. 2228, 2234 (1990). See also Riddick v. Edmiston, 894 F.2d 586, 589 (3d Cir. 1990) (court has plenary review over validity of waiver of right to counsel).

In this case, although the post-trial record created by the State indicates that several of the Petitioner's friends and family members as well as the District Attorney urged the Petitioner to retain counsel before trial, very few of the specific reasons why one ought to have counsel were conveyed to the Petitioner. The District Attorney's alleged statements to the Petitioner concerning the

"unfair contest" that would ensue and the likelihood that the Petitioner would be convicted hardly constitute warnings concerning the specific dangers and disadvantages of self-representation. The only other testimony in the record from a person who allegedly spoke with the Petitioner about the desirability of counsel was from Donald Lizotte, a State Police Detective who considered himself a friend of the Petitioner. Mr. Lizotte testified that he spoke with the Petitioner concerning the fact that a pro se defendant "may not be aware of what evidence the prosecution may be attempting to get in that may be in violation of your rights . . . " But Mr. Lizotte testified further that he received the impression that what he was telling the Petitioner "was going in one ear and out the other."

It deserves emphasis that the Petitioner did not even consult with a lawyer concerning

his criminal prosecution until after his conviction. Although the Petitioner had some knowledge of substantive criminal law, the record does not establish that the Petitioner possessed any detailed knowledge concerning rules of criminal procedure or rules of evidence. With regard to legal terminology, the Petitioner's level of sophistication is illustrated by his testimony (quoted in the Brief in Opposition at 13) that he was unaware of the meaning of the word "adversary".

In short, the record does not establish that this is one of those very rare cases in which a pro se defendant possessed so much knowledge about the criminal justice system that any warnings communicated by the trial court would have served no informative function. To the contrary, the record discloses that the Petitioner was sorely in need of the kind of information that the

Superior Court failed to provide.

SUPPLEMENTAL ARGUMENT

RECENT JUDICIAL DECISIONS CONFIRM THAT THE HOLDING OF THE MAINE SUPREME JUDICIAL COURT CONFLICTS WITH THE PREVALENT VIEW OF WHAT THE SIXTH AND FOURTEENTH AMENDMENTS REQUIRE FOR A VALID WAIVER OF THE RIGHT TO COUNSEL.

During the five months which have elapsed since the filing of the Petition for a Writ of Certiorari in this case, numerous courts have spoken to the issue of what the record must demonstrate to ensure that a criminal defendant has knowingly and intelligently waived his right to the assistance of counsel at trial. There continues to be a split among the Federal Circuit Courts of Appeal and State appellate courts as to whether a specific inquiry by the trial court expressly addressing the disadvantages of self-representation is required in all cases. See United State v.

Bell, 901 F.2d 574, 577 (7th Cir. 1990), in which the Seventh Circuit stated:

> "Five circuits require either a 'searching inquiry' or a special hearing to ensure that the defendant understands the dangers of proceeding pro se. . . . Four other circuits, including this circuit, have no such requirement."

United States v. Bell, 901 F.2d at 577 (citations omitted).

The prevalent contemporary judicial view is well stated by the Second Circuit:

> "Because the assistance of counsel in a criminal proceeding is constitutionally guaranteed, a district court must inquire into defendant's full understanding of the disadvantages of proceeding pro se, before it finds a waiver of counsel."

United States v. Purnett, 910 F.2d 51, __(2d Cir. 1990). Even those courts which have rejected the necessity of formulaic warnings in every case acknowledge that the trial court "must make a sufficient inquiry to satisfy itself that the defendant in fact understands

the dangers involved in self-representation . . . " United States v. Bell, 901 F.2d at 576. The Sixth Circuit, for example, requires substantial compliance with a model inquiry which "prescribes a battery of questions designed to ascertain the defendant's familiarity with the law [and] to warn the defendant of the gravity of the charges and the dangers of self-representation . . . " United States v. Miller, __F.2d__ (6th Cir. 1990).

During the past five months several state courts have spoken of the need for a clear demonstration that a pro se defendant is aware of the dangers and disadvantages of his course of action. See Dowell v. State, 557 N.E.2d 1063, 1066-67 (Ind. App. 1990) (listing detailed warnings that should be imparted to each pro se defendant during a hearing on the record); State v. Castillo, 791 P.2d 808, 810 (N.M. Ct. App. 1990) ("the trial court should

take special care to advise the defendant as to the pitfalls of self-representation"); State v. Slattery, 239 N.J. Super. 534, 571 A.2d 1314, 1319-20 (1990) ("the defendant must be apprised of the difficulties of self-representation in terms sufficient to enable him to intelligently decide which course to choose."); Wroten v. State, 391 S.E. 2d 575, 576 (S.C. 1990) (Faretta requires either that the trial court warn the Defendant of the dangers of self-representation or that the record demonstrate that the defendant received the requisite warnings from another source).

As this Court stated in June, "[w]e have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent'." Illinois v. Rodriguez, 496 U.S. __, 110 S.Ct. 2793, 2798 (1990). The Petitioner respectfully submits that the Maine

Supreme Judicial Court failed to "indulge in every reasonable presumption against waiver" of the right to counsel, Brewer v. Williams, 430 U.S. 387, 404 (1977), and affirmed the Petitioner's conviction despite the absence of anything resembling the rigorous informational requirements and procedures that are necessary to ensure a knowing waiver. See Patterson v. Illinois, 487 U.S. 285, 108 S.Ct. 2389, 2397-98 (1988).

CONCLUSION

For the reasons set forth in the Petition and in this Reply Brief and Supplemental Brief, a Writ of Certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court.

Dated: September 18, 1990

Respectfully submitted,

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